



IT IS ORDERED as set forth below:

Date: March 30, 2012

**Paul W. Bonapfel
U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

IN THE MATTER OF:	:	CASE NUMBER: 11-73938-PWB
	:	
GLADYS RUTH GOMEZ	:	
and RONALD EDWARD HAWKINS, JR.,	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 7 OF THE
Debtors.	:	BANKRUPTCY CODE
	:	
GLADYS GOMEZ et al.,	:	
	:	
Plaintiffs	:	
	:	
v.	:	ADVERSARY PROCEEDING
	:	NO. 11-5618
CITIBANK, N.A., AS TRUSTEE,	:	
	:	
Defendant.	:	

ORDER

Before the Court is the Defendant's motion to dismiss the Debtors' complaint with prejudice and the Debtors' motion for extension of time to respond. For the reasons stated herein,

the Court denies the Debtors' motion for extension of time, abstains from hearing the claims asserted by the Debtors, and dismisses the complaint without prejudice.

Gladys Gomez "et al"¹ ("Debtors") have filed a "Complaint to Determine Proof of Claim by Way of Successors-in-Interests to Note, Trustee for Mortgage Pass-Through-Certificates Series 2006-4, and Dischargeability of Debt with Respect to Mortgage." The Debtors assert various claims against the Defendant with respect to real property located at 1016 Natalie Lane, Smyrna, Georgia (the "Property"), including breach of contract, negligence, fraudulent misrepresentation, negligent misrepresentation, and violation of the Truth in Lending Act and the Georgia Fair Lending Act.² A fundamental contention of the Debtors is that the Defendant lacks standing "relating to Debtors' mortgage loan and real property" (Complaint, ¶ 38). The Debtors seek damages, an accounting, and a continuation of the automatic stay.

The Debtors filed this action on November 1, 2011. The following day, on November 2, 2011, the Court conducted a hearing on the Defendant's motion for relief from the automatic stay. After hearing argument of the parties, the Court granted the motion, permitting the Defendant to exercise its rights under nonbankruptcy law with respect to the Property. (Doc. 40, November 23, 2011 Order.). The Order further provided, "This Order does not determine or address the

¹It is unclear to whom "et al" in the caption refers. The Court will assume for purposes of this motion that it refers to the joint debtor, Ronald Edward Hawkins, Jr., and will refer herein to the Plaintiff as "Debtors."

²The Debtors make various references to determining the validity, priority or extent of lien and dischargeability of debt pursuant to §§ 541(a)(2), 544(a)(3), 548(a), and 550(a). Any debt owed by the Debtors to the Defendant is presumably dischargeable in this chapter 7 case unless the Defendant timely objects to the Debtors' discharge or dischargeability of its debt. The other references to various avoidance action statutes are nonsensical and, to the extent they are even applicable in any respect, are rights that belong to the trustee, not the debtors.

validity of the subject foreclosure sale.” Based on the Court’s ruling as set forth in the November 23, 2011 Order, the Debtors’ request for continuation of the automatic stay is denied as moot.

Following the hearing, the Debtors converted this case to chapter 7. (Doc. 42). The Debtors have not listed any of the claims against the Defendant as assets of the bankruptcy estate and the Chapter 7 Trustee has not sought to intervene in this proceeding.

The Defendant seeks dismissal with prejudice of the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, made applicable by Rule 7012 of the Federal Rules of Bankruptcy Procedure. The Defendant contends that the complaint is a part of a continuing effort to evade eviction following the foreclosure of the Property; that the claims are barred by res judicata and collateral estoppel; that the complaint does not satisfy the pleading standards of Rule 8 and 9 of the Federal Rules of Civil Procedure and does not state a claim for relief; and that the claims are not actionable as a matter of law.

To survive a motion to dismiss under Rule 12(b)(6), a complaint “does not need detailed factual allegations,” but those allegations “must be enough to raise a right to relief above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A claim must have “facial plausibility,” which is met “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.*

The Defendant has articulated valid grounds for the dismissal of this case, including the poorly drafted, confusing complaint’s failure to state a claim for relief under the standards of *Twombly* and *Iqbal*. But given that the complaint has no bearing on the Debtors’ bankruptcy case,

the more appropriate outcome is for the Court to abstain from hearing the claims asserted by the Debtors in this adversary proceeding.

Section 1334(c)(1) of Title 28 provides, “Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice , or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.”

The extensive prepetition litigation and the filing of this bankruptcy case *thirteen* months after the foreclosure of the Property occurred and the filing of this Complaint one day prior to a hearing on the Defendant’s motion for relief from the automatic stay, tend to show that the Complaint was filed to further delay an eviction. The lifting of the automatic stay resolved that issue and rendered the Debtor’ request for a continuance of the automatic stay moot.

All of the Debtors’ remaining claims are nonbankruptcy claims related to their contention that the foreclosure of the Property on July 6, 2010, was wrongful and in violation of state and/or federal nonbankruptcy law. The Debtors have not listed these claims on Schedule B as assets. In fact, the record reflects that the Debtors have litigated and lost a number of these claims in the Superior Court of Cobb County, Georgia.³ To the extent that any of these claims are valid, they have no bearing on the administration of the bankruptcy estate since the Debtors have not disclosed them as assets, and the Trustee, who arguably is the proper party in interest, has not sought to intervene in this action on behalf of the estate.

³*Gomez v. Amtrust Mortgage Corporation et al.*, Civil Action No. 10-1-9101-49, Superior Court of Cobb County, Georgia. Attached as Exhibits D and E to the Defendant’s Memorandum of Law in Support of Motion to Dismiss Debtors’ Complaint (Doc. 4-1, Exhibits D, E) are the Debtors’ Verified Emergency Petition for Temporary Restraining Order and/or Preliminary Injunction (filed September 13, 2010) and Order and Final Judgment (entered June 14, 2011).

Finally, the Court's conclusion in the November 22, 2012, Order that "[t]his Order does not determine or address the validity of the subject foreclosure sale" was premised on the notion that these matters could best be resolved in a nonbankruptcy forum.

Taking into account all of the circumstances, including the history of litigation between the parties, the prepetition foreclosure of the Property, and the termination of the automatic stay of 11 U.S.C. § 362(a) to permit the lender to exercise its nonbankruptcy law rights to the Property, the Court concludes that abstention is warranted in the interests of justice. For the foregoing reasons, it is

ORDERED that the Debtor's motion for extension of time is denied. It is

FURTHER ORDERED that, pursuant to 28 U.S.C. § 1334(c)(1), the Court hereby abstains from hearing the claims asserted by the Debtors in this adversary proceeding and that this adversary proceeding be, and the same hereby is, dismissed without prejudice.

End of Order

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